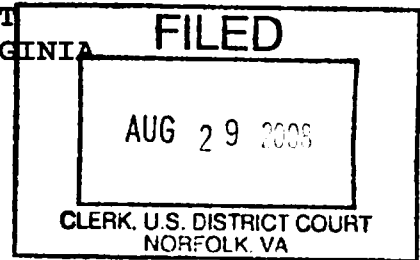


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



RICKY DONNELL NELSON, #312831,

Petitioner,

v.

ACTION NO. 2:07cv572

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's conviction on July 18, 2002, in the Circuit Court of Spotsylvania County, Virginia, for driving after being declared a habitual offender. Petitioner was sentenced to serve five (5) years in prison, three (3) years and two (2) months of which were suspended, contingent upon good behavior for a period of ten (10) years following his release from incarceration.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the Magistrate Judge was filed on July 27, 2008 ("Magistrate Judge's Report and Recommendation"), denying Petitioner's motion

for an evidentiary hearing and recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the Magistrate Judge's Report and Recommendation. On August 12, 2008, the Court received Petitioner's Response to the Report and Recommendation of the United States Magistrate Judge ("Petitioner's Objections"). The Court received no response from Respondent.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's Report and Recommendation, and having made de novo findings with respect to the portions objected to,¹ does hereby ADOPT AND APPROVE the findings and recommendations set forth in the Magistrate Judge's Report and Recommendation filed on July 28, 2008, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED WITH

¹Petitioner generally objects to the Magistrate Judge's Report and Recommendation.

Petitioner also raises a new claim: the Virginia circuit court that declared Petitioner a habitual offender "was without jurisdiction" because Petitioner was improperly served under Virginia state law. Petitioner's Objections, at 1. A pro se litigant is entitled to a liberal reading of his pleadings. Jacobi v. Blocker, 153 F.R.D. 84, 86 (E.D. Va. 1994). Accordingly, the Court construes this new claim as a motion to amend Petitioner's original habeas petition. Under 28 U.S.C. § 2242 and Federal Rule of Civil Procedure 15(a), a party may amend his pleadings only by leave of the court, which "should freely [be] give[n] when justice so requires." Federal Rule of Civil Procedure 15(a). Nelson's claim, however, was not raised in his direct appeal to the Supreme Court of Virginia nor his state habeas petition. Therefore, this claim would be procedurally defaulted under Virginia law. See Va. Code Ann. § 8.01-654(B)(2). Accordingly, the Court DENIES petitioner's motion for leave to amend as futile under Federal Rule of Civil Procedure 15(a).

PREJUDICE and that judgment be entered in favor of Respondent.

Accordingly, the Court FINDS that the grounds set forth in claims 4 and 5 are barred by the statute of limitations, claims 3 and 6 are procedurally defaulted, and claims 1 and 2 are DENIED as Petitioner has failed to show either that the Supreme Court of Virginia unreasonably determined the facts or unreasonably applied federal law in dismissing these claims.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.



Jerome B. Friedman
United States District Judge

Norfolk, Virginia

~~August~~
September 28, 2008